APPENDIX

No. 9

August Term, 1970

Filed

June 29, 1971

STATE OF WISCONSIN : IN SUPREME COURT

LeROY L. DALTON,

Respondent

v.

HOWARD J. MEISTER,

Appellant.

NOTICE—This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports.

ROBERT W. HANSEN, J. (*dissenting*). The majority affirms the judgment in an action in which:

- the plaintiff, a prominent public official,
- brought suit for damages for defamation of character
- against the defendant, a well-known private citizen,
- based on alleged defamatory statements referring to plaintiff as a ringleader, a "gestapo leader," and as having illegally constituted the grand jury that indicted defendant on bribery charges,

* made by the defendant following his acquittal by jury verdict in criminal proceedings initiated on affidavit of the plaintiff,

* the jury awarding the plaintiff $200,000 in punitive damages, and $75,000 in compensatory damages,

* the trial court letting stand the $75,000 in compensatory damages but reducing to $75,000 the punitive damages.

So we have a libel action brought by a public official against a private citizen on the basis of allegedly defamatory statements concededly related to his official conduct of his official duties.

The right to freely criticize government and those who administer its affairs is a hallmark of our free and democratic republic.[1] Our commitment is to full and free

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[1] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States* (1957), 354 U.S. 476, 484, 77 Sup. Ct. 1304, 1 L.Ed. 2d 1498.

See also: *Stromberg* v. *California* (1931), 283 U.S. 359, 369, 51 Sup. Ct. 532, 75 L.Ed. 1117. ". . . The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. . . ."

debate and discussion, not to repression, direct or indirect.[2] Recognition of the right to criticize those who carry on the functions of government without fear of repercussion came early in our history.[3] Recognition of such right to criticize the conduct of public affairs, in part at least, prompted the constitutional protection given free speech and freedom of

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[2] "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . ." *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254, 270, 84 Sup. Ct. 710, 11 L.Ed 2d 686.

". . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Rosenbloom* v. *Metromedia, Inc.* (decided June 7, 1971), ... U.S. ....., ... Sup. Ct. ....., ... L.Ed, 2d .....

[3] "'. . . The American Colonists were not willing, nor should we be, to take the risk that "[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." *The Trial of John Peter Zenger,* 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors."'" Mr. Justice Goldberg, concurring in result, in *New York Times Co.* v. *Sullivan, supra,* at page 301.

the press[4] in the First Amendment of the United States Constitution.[5] Where public officials are concerned, or where public matters are involved, libel actions have an evident impact upon the right or willingness of citizens to criticize the holders of public office or the conduct of public affairs.[6] If such possible impingement of libel actions brought by public officials as to official conduct criticisms was not before obvious, it was made clear in *New York Times Co.* v. *Sullivan, supra,* holding that ". . . the Constitution delimits a State's power to award damages for

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[4] *See*: *A Constitutional Faith*: Hugo LaFayette Black, Associate Justice, United States Supreme Court, at page 49:

"Free speech plays its most important role in the political discussions and arguments which are the lifeblood of any representative democracy. The lesson of history is crystal clear that the decline of really free political debate is one of the first signs of deterioration in an otherwise free state. Our Founding Fathers recognized this and established a system of government with its written Constitution and Bill of Rights which they believed ensured absolute freedom to any citizen to say anything and believe anything, even if that belief was contrary to our most sacred principles of government and society. Jefferson explained it this way on the occasion of his first inauguration as President of the United States:

" 'If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.' [Thomas Jefferson, First Inaugural Address, March 4, 1801]"

[5] Art I, U. S. Const., providing:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[6] *New York Times Co.* v. *Sullivan, supra,* at pages 272, 273.

libel in actions brought by public officials against critics of their official conduct. . . .'"[7]

In *Sullivan*, the nation's highest judicial tribunal raised the threshold of proof required in libel actions brought by public officials where official conduct, not private conduct,[8] was involved, by holding that First Amendment rights of free speech and press prohibit ". . . a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard or whether it was false or not. . . .'"[9] For the same constitution-based reason, the higher requirement as to proof was extended to libel actions brought by public figures[10] and

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[7] *Id.* at page 283.

[8] "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. . . ." Mr. Justice Goldberg, concurring in result, joined by Mr. Justice Douglas, in *New York Times Co.* v. *Sullivan, supra,* at page 301.

[9] Mr. Justice Brennan, in plurality opinion, *New York Times Co.* v. *Sullivan, supra,* at pages 279, 280.

[10] *See*: *Associated Press* v. *Walker* (1967), 388 U.S. 130, 87 Sup. Ct. 1975, 18 L.Ed. 2d 1094 (retired Army general against a wire service); *Curtis Pub. Co.* v. *Butts* (1967), 388 U.S. 130, 87 Sup. Ct. 1975, 18 L.Ed. 2d 1094 (former football coach against publisher of magazine); *Beckley Newspaper Corp.* v. *Hanks* (1967), 389 U.S. 81, 88 Sup. Ct. 197, 19 L.Ed. 2d 248 (court clerk against newspaper); *Greenbelt Pub. Assn.* v. *Bresler* (1970), 398 U.S. 6, 90 Sup. Ct. 1537, 26 L.E. 2d 6 (state representative and real estate developer against publisher of newspaper); *Ocala Star-Banner Company* v. *Damron* (1971), 401 U.S. 295, ... Sup. Ct. ....., ... L.Ed. 2d ..... (defeated candidate for tax assessor against publisher of newspaper).

persons involved in public events of legitimate public interest.[11]

Individual Justices of the highest appellate court have, in plurality, concurring and dissenting opinions, proposed additional safeguards for freedoms of speech and press against impairment by libel suits brought by public officials or public personalities. These include denying to public officials any right to bring libel suits based on criticism of their official conduct;[12] interpreting the First Amendment so that ". . . at the very least it leaves the people and the press free to criticize officials and discuss

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[11] *Rosenbloom* v. *Metromedia, Inc.* (1971).

[12] "If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened . . . then the citizen and the press should likwise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will be free 'to applaud or to criticize the way public employees do their jobs, from the least to the most important.' If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct." Mr. Justice Goldberg, concurring in result, joined by Mr. Justice Douglas, in *New York Times Co.* v. *Sullivan, supra,* at page 304.

public affairs with impunity;"[13] insuring that ". . . the purpose and effect of the law is to redress actual and measurable injury to private individuals that was reasonably foreseeable as a result of the publication;"[14] restricting the award of damages in libel actions brought by public officials to ". . . proven, actual injuries . . . based on essentially objective, discernible factors. . . ."[15] Summarizing the present state of the law in this area, one Justice recently stated:

". . . [I]t would seem that at least five members of the Court would support each of the following rules:

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[13] ". . . To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials." Mr. Justice Black, concurring, joined by Mr. Justice Douglas, in *New York Times Co.* v. *Sullivan, supra,* at page 297.

[14] Mr. Justice Harlan, dissenting, in *Rosenbloom* v. *Metromedia, Inc., supra,* also holding, "Given the defense of truth, it is my judgment that, in order to assure that it promotes purposes consistent with First Amendment values, the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others. . . ."

[15] Mr. Justice Marshall, dissenting, joined by Mr. Justice Stewart, in *Rosenbloom* v. *Metromedia, Inc., supra,* adding: ". . . If awards are so limited . . . it will be unnecessary to rely, . . . on somewhat elusive concepts of the degree of fault and unnecessary, for constitutional purposes, to engage in ad hoc balancing of the competing interests involved, States would be essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need."

> "For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited."[16]

If the Justice White summarization of the present constitutional mandate controlling libel suits brought by public officials in the area of their official duties is accurate, the writer would hold that it was substantially followed in the case before us as to the standard of proof required. (While the question as to malice submitted to the jury related only to punitive damages, and the test was given as "reckless disregard" rather than "knowing or reckless disregard," no prejudice to the defendant derives from the variance.) However, the $75,000 punitive damages award was, in this writer's opinion, not "strictly limited," and the award of $75,000 in compensatory damages was based, almost entirely on presumed, rather than actual damages. The writer would ground reversal and order a new trial on the issue of damages, not on a constitutional basis but on the ground of sound public policy reflecting a respect for the constitutional values arguably adversely affected by the basis for awarding damages used in this case.

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[16] Mr. Justice White, concurring, in *Rosenbloom* v. *Metromedia, Inc.*, *supra*.

Like Topsy, the law of libel and slander has "jest growed,"[17] and nowhere is this more evident than in the awarding of damages in defamation cases. Without attempting a perhaps overdue reevaluation of barnacles that have attached themselves to the hull over the years,[18] a reexamination of the basis for damage awards in libel cases brought by public officials involving their official conduct is in order. Analysis begins with restating the stated goal of courts in awarding damages for tortious injury or for breach of a contractual promise: *i.e.*, putting the plaintiff in the same financial position he was prior to the tort or breach of contract.[19] Presumably serving such basic

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[17] "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has a kind word. . . . The explanation is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with . . . indignation at the maligning tongue." Prosser, Law of Torts, Handbook Series, (4th Ed.) ch. 19, III. *Defamation*, page 737.

[18] "The actions for defamation developed according to no particular aim or plan. . . ." *Id.* at page 737.

". . . No very comprehensive attempt ever has been made to overhaul and untangle this entire field of law, and, unhappily, there seems to be none in prospect." *Id.* at page 739.

[19] "Compensation is the stated goal of courts in awarding damages for tortious injury or for breach of a contractual promise. . . .

"However, even with all its shortcoming compensation of the plaintiff remains the best expression of the goal of the damage remedy. This principle forms a limiting force on jury verdicts and indicates that American ideas of justice begin by placing emphasis, not on retribution, but on compensation. . . ." 22 Am. Jur. 2d, *Damages*, sec. 12, *Compensation as the general rule or objective*, pages 28, 29.

purpose, three categories of damages have come to be awardable in libel and slander actions: (1) punitive or exemplary damages; (2) special damages, such as loss of business, recoverable only upon proof of loss; and (3) general damages, which the law has come to presume to follow inevitably from defamatory imputation, and which are often recoverable without proof of injury.[20]

As a result of the judge-added permitting of unmeasurable punitive and presumed damage award, unrelated to actual injuries sustained, it is true, as Justice Marshall points out in *Metromedia*, that:

> "The judgments that may be entered in defamation cases are unlike those that may be entered in most litigation since the bulk of the award is given to punish the defendant or to compensate for presumed damages. . . ."[21]

These near-twin doctrines, representing a double windfall beyond truly compensatory damages, to plaintiffs in defamation actions, as Justice Marshall points out, ". . . allow substantial damages without even an offer of evidence that there was actually injury. . . ."[22] Of the permitting "presumed" damages before us on this appeal, it can be said, as Justice Marshall said of the libel action

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[20] 50 Am. Jur. 2d, *Libel and Slander*, M., *Damages*, 1. *In General*, sec. 349, page 869.

[21] Mr. Justice Marshall, dissenting, joined by Mr. Justice Stewart, in *Rosenbloom v. Metromedia, Inc.* at page .....

[22] *Id.* at page ....., adding: "The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. . . . These awards are not to compensate victims; they are only windfalls. . . ." *Id.* at page .....

against *Metromedia*: ". . . . There is no requirement that there be even an offer of proof that there was in fact financial loss, physical or emotional suffering, or that the plaintiff's standing in the community was diminished. The effect is to give juries essentially unlimited discretion and thus give the jury much the same power they exercise under the label of punitive or exemplary damages. The impingement upon free speech is the same no matter what label is attached."[23]

As to the permitting of punitive damage awards in libel or slander actions, Justice Marshall traces their origin to a long ago era of long abandoned complete jury discretion,[24] correctly terming such punitive damages as ". . . . in effect, private fines,"[25] he finds them constitutionally inap-

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[23] *Id.* at pages .....

[24] ". . . The concept of punitive or exemplary damages was first articulated in *Huckle* v. *Money*, 2 Wils. 206 (K.B. 1763)—one of the general warrant cases. There Lord Camden found that the power to award such damages was inherent in the jury's exercise of uncontrolled discretion in the awarding of damages. See I T Sedgwich, Damages, sec. 345-350 (9th ed. 1912). Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1172 (1931)." *Id.* at page .....

[25] ". . . Here the jury awarded Mr. Rosenbloom $725,000 in punitive damages. This huge sum was not given to compensate him for any injury but to punish Metromedia. . . . Thus they serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on juries in awarding punitive damages is that the damages be not 'excessive.' . . ." *Id.* at pages .....

propriate in libel cases brought by public officials or public figures for the reason that ". . . fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press. . . ."[26] So, on such constitutional ground, Mr. Justice Marshall, joined by Mr. Justice Stewart, would eliminate both presumed and punitive damages in the special category with which we here deal:

> "The threats to society's interest in freedom of the press [NOTE: the writer would add freedom of speech as likewise involved.] that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proven, actual injuries. The jury's wide ranging discretion will largely be eliminated since the award will be based on essentially objective, discernable factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgments themselves would be reduced. At the same time society's interest in protecting individuals from defamation will still be fostered. The victims of the defamation will be compensated for their real injuries. They will not be, however, assuaged far beyond their wounds."[27]

The majority of our court says of the Marshall-Stewart holding, that actual damages only can be awarded in libel suits brought by public officials relating to official conduct, that "the court in *Rosenbloom* did not reach that question." That is not quite accurate. The plurality opinion,

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[26] *Id.* at page .....

[27] *Id.* at pages ..... *See also*: *Jones* v. *Fisher* (1968), 42 Wis. 2d 209, 166 N.W. 2d 175 (dissenting opinion by the writer).

written by Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Blackmun, note that "Our Brothers *Harlan* and *Marshall* . . . would also limit any recovery to 'actual' damages." Their sole objection is that ". . . that standard, too, leaves the First Amendment insufficient elbow room within which to function. It is not simply the possibility of a judgment for damages which results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. . . . Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be 'actual' or 'punitive.' "[28] The only doubt expressed is that the Marshall-Stewart recommendation for limiting damages to actual, proven damages will go far enough to protect constitutionally assured rights of free speech. Nowhere, in any of the opinions in *New York Times* or *Metromedia* is there any difference as to the goal: assuring that First Amendment rights of free speech and press will somehow be protected against invasion by libel suits brought by public officials against critics of their performance of their official duties. In determining a proper public policy, the unanimity as to the goal is not to be ignored by differences as to how best to reach it.

What is puzzling to the writer about the majority opinion of our court is that, except for observing that the quantum of proof required by the *New York Times Co. Case* in libel actions brought by public officials against critics of their official conduct was met, it treats this case exactly like any other libel or slander action. It treats both *New York*

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[28] Mr. Justice Brennan, in plurality opinion, *Rosenbloom* v. *Metromedia, Inc.*, at page .....

Times and *Metromedia* as if they were concerned solely with burden of proof, rather than with a deeply disturbing question of public policy and constitutional implications—how to best limit libel suits by public officials and public figures so that there is no "chilling effect"[29] upon the right of citizens and press to comment and criticize the conduct of public affairs. The majority of our court appears to feel that the added requirement of establishing malice in cases brought by public officials for libel against their critics is a sufficient protection for the right to speak freely about government and its officials. The writer does not share the faith. At best it is an "evanescent protection."[30] The verbal blows exchanged in the heat of public debate and controversy are as unlikely to be accompanied by goodwill or good intentions as are their fistic equivalents in the prizefight ring. The dividing line between malice and indignation can be paper-thin, especially in a courtroom months after the heat of the moment has passed. From the standpoint of public policy, full freedom of political debate and discussion is better, or at the least, additionally well served by limiting a public official in a libel action to recovering his actual damages. This is so particularly be-

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[29] ". . . The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms. . . ." Mr. Justice Goldberg, concurring in result, joined by Mr. Justice Douglas, in *New York Times Co.* v. *Sullivan*, *supra* at page 300.

[30] "'Malice' . . . is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs. . . ." Mr. Justice Black, concurring, joined by Mr. Justice Douglas, in *New York Times Co.* v. *Sullivan*, *supra*, at page 293.

cause anyone who assumes a position of prominence as a public official or public personality knows very well, in advance, that verbal brickbats are as likely to come his way as verbal bouquets.[31] It is this near-unavoidable concommitant of public or governmental prominence that led to the admonition, "If you can't stand the heat, get out of the kitchen." Where a public official or public figure elects to stay near the stove, he can expect to get some heat. Where the heat he endures as to his official conduct can be established to be produced with a "knowing and reckless disregard of the truth," sound public policy permits him to sue for and recover in a libel action his actual, provable damages with no presumed or punitive damages to be added. Since both presumed damages and punitive damages are judicial inventions, not legislative creations, the writer would find the public policy best served by denying their applicability at least in this limited and special category of libel and slander cases: those brought by public officials against their critics.

Justices Marshall and Stewart would reach the same result on constitutional grounds, holding the First Amendment protections to free speech and press to require that in libel actions brought by public officials or public figures related to official duties or matters of public interest, damages must be limited to actual damages, with neither presumed nor punitive damages to be permitted. The writer

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[31] ". . .In a democratic society, one who assumes to act for the citizens in an executive, legislative or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel." Mr. Justice Goldberg, concurring in result, joined by Mr. Justice Douglas, in *New York Times Co.* v. *Sullivan, supra,* at page 299.

does not find their interpretation to be a constitutionally-based mandate to state courts; neither did their colleagues. However, the writer finds their arguments unanswerable and their reasoning more than persuasive, and would, as sound public policy, adopt their conclusion that in libel actions brought by public officials against critics of their official functioning, damages be limited to those actual or special damages that reflect the loss or injuries in fact sustained by the public official-plaintiff, including loss of income, physical or emotional suffering, loss of standing in profession or community, expenses, and provable future injury, but not including either presumed or punitive damages.

Applying such restricted standard as to awardable damages to the judgment in the case before us would require striking from it the $75,000 award of punitive damages. As to what portion of the $75,000 award for compensatory damages represents presumed damages, it is not possible to do more than to find from the record that a major share of it does. The respondent's brief, urging affirmance of the judgment, as to compensatory damages, states that ". . . the law furnishes no legal rules for measuring them," a claim of virtue that the writer sees as the exact vice. Respondent's counsel relies almost entirely upon a 1914 Wisconsin case dealing with presumed damages[32] as warranting affirmance of the compensatory damages award. The reference and reliance are understandable for it is evident that presumed damages are a major (if unmeasurably so) portion of the compensatory damages award. This being so, the writer would reverse and remand for a new trial on the issue of damages only, such determination of damages

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[32] *Williams* v. *Hicks Printing Co.* (1914), 159 Wis. 90, 150 N.W. 183.

not to include either punitive or presumed damages and to be limited to actual damages, including loss of income, physical or emotional suffering, diminution of standing in profession or community, expenses and probable future losses, so that a victim of a defamation who is a public official with his official duties the target of the defamatory remarks "will be compensated for . . . [his] real injuries," but ". . . will not be, however, assuaged far beyond . . . [his] wounds."[33]

I am authorized to state that Mr. Justice Leo B. Hanley joins in this dissenting opinion.

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[33] Mr. Justice Marshall, dissenting, joined by Mr. Justice Stewart, in *Rosenbloom* v. *Metromedia, Inc., supra,* at page .....